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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| DOLORES M., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY, KEVIN M., and RHODRY M., Appellees. | 2 CA-JV 2011-0041<br>DEPARTMENT B<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 28, Rules of Civil Appellate Procedure |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. J18849600

Honorable Hector E. Campoy, Judge

AFFIRMED

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Sanders & Sanders, P.C.
By Ken Sanders
Tucson
Attorneys for Appellant

Thomas C. Horne, Arizona Attorney General
By Jane A. Butler
Tucson
Attorneys for Appellee
Arizona Department of Economic Security

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E S P I N O S A, Judge.

**¶1** Dolores M. appeals from the juvenile court's order terminating her parental rights to her children, Kevin M. and Rhodry M., born in 2002 and 2003, respectively, based on length of time in care pursuant to A.R.S. § 8-533(B)(8)(c).[1] On appeal, Dolores argues A.R.S. § 8-862[2] is unconstitutional, and, by following the procedures set forth in the statute, the court violated her due process rights. We affirm.

**¶2** A juvenile court may terminate a parent's rights if it finds clear and convincing evidence of one of the statutory grounds for severance and a preponderance of evidence that termination of the parent's rights is in the children's best interests. A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). On review, we "accept the juvenile court's findings of fact unless no reasonable evidence supports those findings, and we will affirm a severance order unless it is clearly erroneous." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002). And, we view the evidence in the light most favorable to

[1]The father is not a party to this appeal.

[2]Section 8-862(D)(1) provides:

> If the court determines that the termination of parental rights is clearly in the best interests of the child, the court shall:
>
> 1. Order the department . . . to file within ten days after the permanency hearing a motion alleging one or more of the grounds prescribed in § 8-533 for termination of parental rights. The party who files the motion has the burden of presenting evidence at the termination hearing to prove the allegations in the motion.

upholding the court's ruling. *See Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 20, 995 P.2d 682, 686 (2000).

**¶3** Dolores does not dispute the facts relied upon by the juvenile court as set forth in its under advisement ruling terminating her parental rights; nor does she appear to dispute the court's findings regarding the sufficiency of the evidence to support the grounds for termination or that termination was in the children's best interests. Accordingly, we provide only a brief summary of the relevant facts for purposes of background. Based on undisputed allegations that Dolores's boyfriend, Nicholas, had physically abused Kevin, Child Protective Services (CPS) removed the children from Dolores's custody in October 2008. Nicholas told police he had hit Kevin for "about 20 minutes" with a belt, striking him on his back "6 times, to match his age," and that Dolores was present in the home while this took place. Dolores, who had an outstanding out-of-state warrant, was arrested and extradited to Colorado, where she was convicted of a felony and placed on probation during the proceedings in this case. Although Dolores's Colorado probation officer informed her she could relocate to or visit Arizona, she did not, and has not seen Kevin or Rhodry since the dependency petition was filed in October 2008. Dolores was provided with numerous reunification services in Colorado.

**¶4** In December 2010, at the fifth permanency hearing, the juvenile court's findings included that the children had been in out-of-home placements for twenty-three months and that Dolores had continued to maintain a relationship with Nicholas, placing the children "at risk." The court concluded the children could not be returned safely to

Dolores. It changed the case plan goal to severance and adoption, and ordered the Department of Economic Security (ADES) to file a motion to terminate the parents' rights. In its motion, ADES alleged as grounds for termination neglect or abuse, and length of time in out-of-home care. *See* § 8-533(B)(2), (B)(8)(c). ADES also asserted that terminating Dolores's parental rights was in the children's best interests. After a contested severance hearing held in March and April 2011, at which Dolores appeared telephonically, the court terminated her rights to the children based solely on length of time in out-of-home care. The court also found severance in the children's best interests. Dolores and the children were represented by counsel during the dependency proceedings and at trial.

**¶5** On appeal, without citing any facts specific to this case, Dolores generally contends the statutory scheme set forth in § 8-862 is unconstitutional.[3] She asserts that, once a juvenile court orders ADES to file a motion for termination at a permanency hearing in the course of a dependency matter pursuant to § 8-862(D)(1), the court is unable to act as "an impartial decision-maker," resulting in a proceeding that lacks any "appearance of fundamental fairness." Dolores claims, "Having already determined that Appellant's parental rights *should* be terminated, it would be naive to believe that the

[3]The legislature enacted § 8-862 in 1997 in an effort to "accelerate the process by which parental rights are terminated so that children can be adopted more readily and at an earlier age." *Mara M. v. Ariz. Dep't of Econ. Sec.*, 201 Ariz. 503, ¶¶16-17 & ¶ 16, 38 P.3d 41, 43-44 & 44 (App. 2002); 1997 Ariz. Sess. Laws, ch. 222, § 52; *see also Rita J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 512, ¶ 5, 1 P.3d 155, 156-57 (App. 2000) (section 8-862 adopted to enable timely permanency proceedings).

Juvenile Court could or would fairly and impartially determine whether legal grounds existed to support its determination." She generally asserts that, after the court has made preliminary findings that termination is in the children's best interests, the subsequent trial is "purely nominal" because the court has already determined the outcome, thereby violating the parent's due process rights. Dolores thus asks that we declare § 8-862 unconstitutional and vacate the order terminating her parental rights to Kevin and Rhodry.

**¶6** But Dolores failed to challenge the constitutionality of § 8-862 at the termination hearing and therefore has waived appellate review of this issue. *See K.B. v. State Farm Fire & Cas. Co.*, 189 Ariz. 263, 268, 941 P.2d 1288, 1293 (App. 1997) (appellate court "generally [does] not consider arguments, including ones concerning constitutional issues, raised for the first time on appeal"). Although we may, in our discretion, consider a constitutional argument raised for the first time on appeal, *see Marco C. v. Sean C.*, 218 Ariz. 216, ¶ 6, 181 P.3d 1137, 1140 (App. 2008), we decline to do so here. Merely asserting a due process challenge does not necessarily ensure we will consider the argument on appeal. *See In re Pima County Mental Health No. MH 1140-6-93*, 176 Ariz. 565, 568, 863 P.2d 284, 287 (App. 1993) (declining to consider due process claims raised for first time on appeal where not compelling and facially lacking merit). Moreover, "[c]ourts should decide cases on nonconstitutional grounds if possible, avoiding resolution of constitutional issues, when other principles of law are controlling and the case can be decided without ruling on the constitutional questions." *Little v. All*

*Phoenix S. Cmty. Mental Health Ctr., Inc.*, 186 Ariz. 97, 101, 919 P.2d 1368, 1372 (App. 1995).

**¶7** Here, Dolores not only failed to assert § 8-862 was facially unconstitutional at the termination hearing, but she failed to develop any evidence that the juvenile court had acted with the bias she argues is inevitable under the statutory scheme. Thus, in addition to the policy supporting waiver, the record is devoid of any evidence of bias by the juvenile court. *See Emmett McLoughlin Realty, Inc. v. Pima County*, 212 Ariz. 351, ¶ 24, 132 P.3d 290, 296 (App. 2006) (judges entitled to presumption of "'honesty and integrity'"), *quoting Pavlik v. Chinle Unified Sch. Dist. No. 24*, 195 Ariz. 148, ¶ 24, 985 P.2d 633, 639 (App. 1999). The court conducted five permanency hearings and waited until the children had been out of the family home for almost two years before it changed the case plan goal to severance and adoption and ordered ADES to file a motion to terminate. At that point ADES, not the court, decided which grounds to allege in the motion. *See* § 8-862(D)(1).

**¶8** Moreover, as we have previously found, orders entered after a permanency hearing are not final and appealable, specifically because they "contemplate further proceedings that will determine the ultimate outcome of the case," which remains uncertain until the proceedings are concluded. *Rita J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 512, ¶ 8, 1 P.3d 155, 158 (App. 2000). This is precisely what happened here; after the court ordered ADES to file a motion to terminate, ADES had the burden of proving the grounds asserted in the motion. *See* § 8-862(D)(1). And only after hearing the

evidence presented, did the court reaffirm its earlier best interests finding. Notably, the court found ADES had not proved all of the grounds alleged and instead ordered Dolores's rights severed solely on one ground.

**¶9** Therefore, in light of our decision to decline addressing Dolores's constitutional challenge to § 8-862, and in the absence of any challenge to the juvenile court's order on the merits, the court's order terminating Dolores's parental rights to Kevin and Rhodry is affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge